UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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CANON U.S.A., INC. and CANON FINANCIAL SERVICES, INC.,

Plaintiffs,

vs.

DIVINIUM TECHNOLOGIES INC., formerly known as EZ DOCS, INC. d/b/a OFFICE AUTOMATION SYSTEMS and d/b/a VISTA DIGITAL SOLUTIONS, ANTHONY J. GRIMALDI, STEVEN HERNANDEZ, CATHERINE MATTIUCCI, LEONARD J. HARAC, JAY J. FREIREICH and BRACH EICHLER LLC,

Defendants.

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15-CIV-01804 (PAC)

DEFENDANTS JAY J. FREIREICH AND BRACH EICHLER LLC'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL

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PRELIMINARY STATEMENT

Defendants Jay J. Freireich ("Attorney Freireich") and Brach Eichler LLC ("Brach Eichler") (collectively hereinafter "BE Defendants"), submit this memorandum of law in opposition to plaintiffs' motion for an Order, pursuant to Fed. R. Civ. P. 37(a), compelling the BE Defendants to produce documents withheld from production on the basis of attorney-client privilege and/or work product doctrine.

This action arises out of an alleged scheme perpetrated by defendants EZ Docs, Inc. ("EZ Docs"), Anthony Grimaldi ("Grimaldi"), Steven Hernandez ("Hernandez"), Catherine Mattiucci ("Mattiucci") and Leonard J. Harac ("Harac") to obtain an authorized business equipment retail dealership from plaintiff Canon U.S.A., Inc. ("Canon USA"). Plaintiffs claim that they were defrauded by EZ Docs, Grimaldi, Hernandez, Mattiucci and Harac and that the BE Defendants aided and abetted the perpetration of the fraud upon them. Plaintiffs are now using these allegations in attempt to vitiate the attorney-client privilege between the BE Defendants and their former clients, Grimaldi and Hernandez, but their efforts must fail.

Plaintiffs first contend that by defaulting in this action and others, Grimaldi and Hernandez have waived the privilege. However, their default does not equate to a waiver of privilege, and plaintiffs fail to point to any case law to support their proposition. Plaintiffs' argument that the crime-fraud exception requires production of the withheld documents is similarly unavailing. Plaintiffs have failed to meet their burden in demonstrating that the withheld communications and work product protected documents themselves were in furtherance of the alleged fraud. Instead, they make the conclusory argument that because Grimaldi, Hernandez and EZ Docs purportedly defrauded Canon USA and end user customers, every withheld document was necessarily in furtherance of the alleged fraud. Not only is this argument insufficient to meet their burden, but it also ignores the fact that numerous documents identified on the BE Defendants' privilege logs, which are related to the BE Defendants' representation of Grimaldi and Hernandez in unrelated matters, the representation of EZ Docs, Grimaldi and Hernandez after Canon USA terminated EZ Docs, and issues regarding former EZ Docs' employees' violations of non-disclosure agreements, have nothing to do with the BE Defendants' alleged furtherance of the purported fraud.

Finally, plaintiffs' argument that documents withheld by the BE Defendants as work product must also be produced should be disregarded by this court. Again, the plaintiffs make arguments that are not supported by governing case law, such as claiming that since the withheld documents were prepared in anticipation of prior litigation involving Grimaldi, Hernandez and EZ Docs, they are not afforded work product protection. Their attempt to put an "expiration date" on work product protection should be rejected. Moreover, plaintiffs' contention that the BE Defendants placed the withheld documents at issue by simply denying allegations in plaintiffs' complaint, without specifically relying on any of the withheld documents, is baseless. Plaintiffs' conclusory belief that they have a substantial need for the withheld documents is also insufficient to require production of attorney work product.

Plaintiffs' attempt to cast the BE Defendants' withholding of documents as self-serving ignores the sanctity of the attorney-client privilege and the BE Defendants' ethical responsibilities to their former clients. Simply put, it is not the BE Defendants' decision to waive the privilege, it is the decision of Grimaldi and Hernandez. As plaintiffs have not set forth any basis to compel the BE Defendants' to produce the privileged documents and communications, their motion should be denied in its entirety.

FACTUAL ALLEGATIONS

Plaintiffs contend that in early June 2008, Harac, Grimaldi and Hernandez made a bid to acquire an authorized Canon retail dealership held by Office Automation Systems ("OAS"), with their company, Empire Technology ("Empire"), but Canon USA did not approve the acquisition due to Grimaldi and Hernandez's arrests in connection with a scheme to defraud. See Complaint, ¶¶ 44-47, annexed to the Declaration of Jonathan B. Bruno ("Bruno Dec.") as Exhibit A. Shortly after learning that Canon USA rejected Empire's acquisition proposal, plaintiffs claim that Grimaldi, Hernandez, Harac and Mattiucci entered into a conspiracy to defraud Canon USA in order to acquire OAS. See Bruno Dec., Ex. A, ¶¶ 46-47. According to plaintiffs, it was agreed that Mattiucci, Grimaldi's sister, would act as a new buyer interested in acquiring OAS and that she would hold the title of President and be the sole nominal shareholder of EZ Docs, which was formed to own the dealership, but the actual ownership of EZ Docs would purportedly be split between Grimaldi and Hernandez, who would manage and control EZ Docs with the assistance and participation of Mattiucci and Harac. See Bruno Dec., Ex. A, ¶ 49. Canon USA approved EZ Docs' acquisition of OAS in November 2008. See Bruno Dec., Ex. A, ¶ 52, Declaration of Robert G. Manson ("Manson Dec."), Exhibit 8.

Attorney Freireich, while at his prior firm, Poe & Freireich, was not retained by Grimaldi, Hernandez and Mattiucci in regards to EZ Docs until December 4, 2008, *after* Canon USA had already approved EZ Docs' acquisition of OAS. See Bruno Dec., Exhibit B. On that date, Grimaldi, Hernandez and Mattiucci entered in an Option to Purchase Stock Agreement, which provided that Mattiucci was the owner of 100% of EZ Docs' stock and that Grimaldi and Hernandez had the option to purchase all of the stock from her at any time for $10,000. See Manson Dec., Exhibit 9.

More than one year later, in January 2010, Vista Digital Solutions, Inc.'s ("Vista") president contacted Canon USA about her desire to sell Vista to EZ Docs and requested Canon USA's approval of the transfer of ownership. See Manson Dec., Exhibit 10. Attorney Freireich, and, beginning on March 23, 2010, Brach Eichler (Attorney Freireich joined Brach Eichler in March 2010), represented Grimaldi, Hernandez and EZ Docs (with Mattiucci executing the retainer agreement as President of EZ Docs) regarding EZ Docs' acquisition of Vista, which included the negotiation of the Asset Purchase Agreement ("APA"). See Bruno Dec., Exhibit C[1];

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[1] The retainer agreement is incorrectly dated as March 23, 2009 and should have been dated March 23, 2010. Attorney Freireich did not join Brach Eichler until March 2010.

Manson Dec., Exhibit 13. Canon USA approved EZ Docs acquisition of Vista, which closed in August 2010. See Bruno Dec., Ex. A, ¶ 63.

Upon information and belief, as early as October 2010, Canon USA began receiving complaints regarding OAS/EZ Docs. See Bruno Dec., Exhibit D. These complaints noted Grimaldi and/or Hernandez's involvement with OAS/EZ Docs, and Canon USA representatives communicated with, among others, Hernandez, regarding these complaints on numerous occasions. See Bruno Dec., Exhibits D and E. These complaints continued, with Canon USA representatives recommending the termination of EZ Docs' dealership as early as January/February 2011. See Bruno Dec., Exhibit F. While plaintiffs claim that they did not want to do business with Grimaldi and Hernandez, and that this was the basis for Canon USA's decision to deny approval for the sale of OAS to Empire, Canon USA waited more than one year after learning of Grimaldi and/or Hernandez's involvement with OAS/EZ Docs before terminating its authorized Canon retail dealership on October 25, 2011. See Bruno Dec., Exhibit G.

Following Canon USA's termination of EZ Docs, the BE Defendants represented EZ Docs in an action against Canon USA regarding the termination. See Manson Dec., Exhibit 29. The BE Defendants also represented EZ Docs in some actions commenced by end user customers. The BE Defendants obtained an order to withdraw as counsel in the EZ Docs action against Canon USA in May 2012. See Bruno Dec., Exhibit H.

ARGUMENT

POINT I

THERE HAS BEEN NO WAIVER OF PRIVILEGE BY GRIMALDI AND/OR HERNANDEZ

It is well-settled that "the attorney-client privilege belongs solely to the client and it may only be waived by him or her. An attorney may not waive the privilege without his client's consent." Lama v. Malik, 25 F.Supp.3d 316 (E.D.N.Y. 2014). While plaintiffs argue that it is the BE Defendants burden of proving that the privilege shields the withheld documents from production, they do not make any arguments that the documents that were withheld were not subject to privilege. Plaintiffs also do not argue that Grimaldi and Hernandez have consented to waive the privilege. Rather, plaintiffs contend that Grimaldi and Hernandez have waived their privilege, but their arguments must fail, as they are either unsupported by or inapposite to governing case law.

First, plaintiffs argue that because Grimaldi and Hernandez defaulted in this action and others, "it is obvious" that they do not intend to defend themselves in any matter. However, plaintiffs have not, nor can they, cite to any case law which holds that a defaulting party in an action waives its attorney-client privilege or permits the defaulting party's attorney to disclose their privileged communications. Simply because Grimaldi and Hernandez did not appear in this action does not mean that they waived their attorney-client privilege with the BE Defendants in prior matters, and it certainly does not permit the BE Defendants to waive that privilege. The attorney-client privilege does not disappear once an action is adjudicated, as the plaintiffs seem to suggest to this court. If the privilege survives the death of a client, surely it survives the conclusion of a prior legal proceeding. See Swidler & Berlin v. U.S., 524 U.S. 399, 118 S.Ct. 2081 (1998).

Plaintiffs' related argument, that since Grimaldi and Hernandez have defaulted in this action, the privilege does not achieve anything for them and should be deemed waived, is similarly unavailing. Plaintiffs have not cited to any case law to support the proposition that if the assertion of the privilege is not helpful to the client, it is relinquished, nor is there any basis to apply such subjective conditions to the attorney-client privilege. Further, contrary to plaintiffs' contentions, withholding of privileged documents is not about protecting the BE Defendants "interests;" it is about the BE Defendants' ethical obligations to their former clients. The BE Defendants cannot simply ignore the attorney-client privilege and turn over documents to plaintiffs simply because plaintiffs want them.

Next, plaintiffs cite to factually inapposite case law to support their mistaken belief that Grimaldi and Hernandez have waived the attorney-client privilege. Here, the BE defendants have produced a detailed privilege log and objected to document requests on the basis of privilege, so plaintiffs' reliance on Huber v. Arck Credit Co., 2016 WL 482955 (S.D.N.Y. 2016) and UBS International, Inc. v. Itete Brasil Instalacoes Telefonicas Ltd., 2010 WL 743371 (S.D.N.Y. 2010) is misplaced. While plaintiffs contend that the attorney-client privilege should be "strictly construed," they have failed to demonstrate how the withholding of undisputedly privileged communications between the BE Defendants and their former clients, Grimaldi and Hernandez, is somehow a liberal construction of the privilege. There has been no implied waiver of the privilege as contemplated by the cases relied upon by plaintiffs. The BE Defendants have not partially disclosed privileged communications in support of their defense while shielding them from plaintiffs, nor have they disclosed privileged items with Grimaldi and/or Hernandez's authorization. See In re Grand Jury Proceedings, 219 F.3d 175 (2d Cir. 2000); In re von Bulow, 828 F.2d 94 (2d Cir. 1987).

Simply put, there is no dispute that the withheld documents are subject to attorney-client privilege and no support for the plaintiffs' belief that Grimaldi and Hernandez have either lost their right to assert the privilege, waived the privilege or consented to the BE Defendants' waiver of the privilege. As such, the BE Defendants are prevented from disclosing privileged communications with Grimaldi and Hernandez and have properly withheld them from production.

POINT II

THERE IS NO BASIS TO INVOKE THE CRIME-FRAUD EXCEPTION

It is well-settled that in order to invoke the "crime-fraud" exception to attorney-client privilege, plaintiffs "must at least demonstrate that there is probable cause to believe that a crime or fraud has been attempted or committed and that the communications were in furtherance thereof." In re Richard Roe, Inc., 68 F.3d 38, 40 (2d Cir. 1995). Importantly, "the crime-fraud exception does not apply simply because privileged communications would provide an adversary with evidence of a crime or fraud...Instead, the exception applies only when the court determines that the client communication or attorney work product in question was *itself* in furtherance of the crime of fraud." Id. Further, "the crime-fraud exception applies only where there is probable cause to believe that the particular communication with counsel or attorney work product was intended in some way to facilitate or conceal the criminal activity." Id.; see also In re Omnicom Group, Inc. Securities Litigation, 233 F.R.D. 400, 404 (S.D.N.Y. 2006).

In support of their motion, plaintiffs argue that Grimaldi and Hernandez perpetrated a fraud on Canon USA by duping it into believing that EZ Docs was owned and controlled by Mattiucci, and that they did so with the assistance of the BE Defendants. In support of this contention, plaintiffs refer to an Option to Purchase Stock Agreement for EZ Docs, which was executed almost two years prior to EZ Docs' purchase of Vista, and a Nominee Declaration, executed more than one year after EZ Docs' purchase of Vista. Neither of these documents constitutes evidence that EZ Docs' purchase of Vista, in and of itself, was a fraud.

Plaintiffs next claim that Grimaldi and Hernandez took numerous steps to perpetrate their purported fraud on Canon USA, yet they only refer to documents prepared and submitted to Canon USA by Mattiucci, such as Mattiucci's biography and business plans. Plaintiffs offer nothing more than Canon USA's mere belief that the information in the biography was fabricated, and there is no indication that Grimaldi or Hernandez created or prepared these documents. At best, these documents potentially demonstrate a purported fraud perpetrated on Canon USA by Mattiucci and EZ Docs pertaining to EZ Docs' purchase of Vista. While plaintiffs may have asserted allegations that Grimaldi and Hernandez were engaged in a fraud upon Canon USA's end user customers after EZ Docs purchased Vista, plaintiffs have failed to demonstrate probable cause that Grimaldi and Hernandez fraudulently purchased Vista or that any communications that they had with the BE Defendants were in furtherance of any fraud upon Canon USA. See In re: 650 Fifth Avenue, 2013 U.S. Dist. LEXIS 106474, at *8 (S.D.N.Y. July 25, 2013).

Further, it is disingenuous for plaintiffs to claim that there was a fraud perpetrated by Grimaldi or Hernandez on Canon USA as to EZ Docs' purchase of Vista, as Canon USA was well aware shortly after the acquisition that both Grimaldi and Hernandez were involved with EZ Docs, yet Canon USA did nothing about it. In fact, as early as October 2010, one year before Canon USA terminated EZ Docs' authorized dealership, individuals at Canon USA were exchanging emails with Hernandez and had received customer complaints indicating that Grimaldi was the business contact for OAS/EZ Docs. See Bruno Dec., Exs. D, E. Further, as early as January/February 2011, individuals at Canon USA were well aware of EZ Docs' purported scheme on its end user customers and recommended termination of EZ Docs' authorized Canon retail dealership at that time, but Canon USA did not terminate EZ Docs' until approximately nine months later. See Bruno Dec., Exs. F, G. Given that Canon USA was well aware of Grimaldi and Hernandez's involvement in EZ Docs, plaintiffs cannot now contend that EZ Docs purchase of Vista was a fraud upon Canon USA, when Canon USA knowingly allowed this alleged "fraud" to continue.

Importantly, plaintiffs have not met their burden to demonstrate that any of the withheld communications were intended to facilitate or conceal any fraud upon Canon USA. Rather, plaintiffs make the conclusory and blanket argument that since Grimaldi and Hernandez allegedly perpetrated a fraud upon Canon USA, all privileged communications must be produced. This is insufficient to satisfy plaintiffs' burden. It is well-settled that simply providing evidence of a fraud is not enough to vitiate the attorney-client privilege. See In re: General Motors LLC Ignition Switch Litigation, 2015 U.S. Dist. LEXIS 15972, at *135 (S.D.N.Y. Nov. 25, 2015) (holding that "evidence of a crime of fraud alone is not enough to vitiate the attorney-client privilege and work product doctrine, and that the moving party must *also* show that the particular communication with counsel or attorney work product was intended in some way to facilitate or conceal the criminal activity"); see also United States v. Nunez, 2013 U.S. Dist. LEXIS 116145 (S.D.N.Y. Aug. 16, 2013) (holding that the crime-fraud exception did not apply where the client communication at issue, even if it arguably provided evidence of a crime, was not in itself in furtherance of the crime); Conopco, Inc. v. Wein, 2007 U.S. Dist. LEXIS 46945 (S.D.N.Y. 2007) (noting that allegations of fraud in a complaint are insufficient to establish probable cause to believe that a fraud was perpetrated, as "[o]therwise, through the mere allegation of fraud in a complaint, a party could use the crime-fraud exception to wholly swallow the attorney-client privilege"). Based on the governing case law, plaintiffs cannot vitiate the privilege based on their self-serving and unsupported belief that all communications between Grimaldi, Hernandez and the BE Defendants necessarily intended to advance or conceal the alleged fraud.

To the extent that plaintiffs refer to documents evidencing fraud perpetrated by Grimaldi and Hernandez on end user customers, any such complaints occurred well after the APA was prepared and the transaction closed in August 2010. Further, a review of the BE Defendants' privilege logs reveal that the communications withheld on the basis of privilege were either not from the time period that Grimaldi, Hernandez and EZ Docs were purportedly defrauding end user customers, or had nothing to do with the alleged fraud, as they pertained to unrelated matters for which the BE Defendants were representing either Grimaldi or Hernandez, or issues with former EZ Docs' employees violating non-compete agreements. Even if the crime-fraud exception was applicable, which it is not, plaintiffs' call for the production of all documents withheld as privileged is clearly improper, given the nature of the documents withheld as per the BE Defendants' privilege logs. Plaintiffs have not presented any factual basis that any of these communications were in furtherance of a fraud. See Amusement Industry Inc. v. Stern, 293 F.R.D. 420 (S.D.N.Y. 2013) (holding that even if "the court finds that the crime-fraud exception is applicable, it does not extend to all communications made in the course of the attorney-client relationship, but rather is limited to those communications and documents in furtherance of the contemplated or ongoing criminal or fraudulent conduct") (internal citations omitted).

Similarly, production of any privileged communications between the BE Defendants and Grimaldi and Hernandez relating to EZ Docs' lawsuit against Canon USA regarding the termination of EZ Docs' authorized Canon dealership or defense of Grimaldi and Hernandez in lawsuits brought by end-user customers is not warranted under the crime-fraud exception. All of these communications occurred after Canon USA terminated EZ Docs, and it did so after it "determined that Grimaldi and Hernandez were working for EZ Docs, and suspected that they were the actual principals of the company." See Plaintiffs' Memorandum of Law in Support, p. 8. The BE Defendants' representation of EZ Docs after the fact does not constitute a fraud on Canon USA, and there is simply no basis for the production of any privileged communications, especially those subsequent to October 25, 2011.

As plaintiffs have failed to meet their burden to establish the applicability of the crime-fraud exception to the documents withheld by the BE Defendants on the basis of attorney-client privilege and work product protection, their motion should be denied in its entirety.

POINT III

THE BE DEFENDANTS HAVE PROPERLY ASSERTED THE WORK PRODUCT PRIVILEGE

For a document to warrant work product protection, the "material must (1) be a document or a tangible thing, (2) that was prepared in anticipation of litigation, and (3) was prepared by or for a party, or by or for his representative." In re Grand Jury Subpoenas Dated December 18, 1981 & January 4, 1982, 561 F.Supp. 1247, 1257 (E.D.N.Y. 1982). Here, plaintiffs are not claiming that the withheld documents are not work product, but rather that the protection should not apply to the documents for a variety of reasons. None of these reasons warrant production of the privileged documents.

At the outset, plaintiffs ignore the fact that the work product privilege also belongs to the BE Defendants, not just Grimaldi, Hernandez and EZ Docs, and that the BE Defendants are entitled to assert that privilege. See AP Links, LLC v. Russ, 299 F.R.D. 7 (E.D.N.Y. 2014). As discussed in more detail above, neither Grimaldi nor Hernandez have waived any privilege as to the BE Defendants and the crime-fraud exception is inapplicable. Documents and notes that the BE Defendants prepared in anticipation of EZ Docs' litigation against Canon USA and in anticipation of litigation by end user customers against EZ Docs, Grimaldi and Hernandez are the definition of materials warranting work product protection, and plaintiffs have not articulated any basis for the production of these documents.

First, plaintiffs contend that because the work product privilege was asserted related to the BE Defendants' representation of EZ Docs, Grimaldi and Hernandez in prior matters, not in connection with this action, that they somehow do not deserve protection. This argument is baseless. Plaintiffs have not cited to any case law, nor can they, to support their belief that the work product privilege is only applicable to documents prepared in anticipation of a still-pending litigation, or that the privilege disappears once litigation concludes. Plaintiffs' suggestion that there is a time limit on work-product protection is without merit. All documents that the BE Defendants prepared in anticipation of EZ Docs' litigation against Canon USA and in defense of anticipated litigation against EZ Docs, Grimaldi and Hernandez by end user customers is protected by the work product privilege, and plaintiffs cannot demonstrate otherwise. Importantly, plaintiffs do not contend that the documents withheld are not work product, only that the work product protection has somehow expired.

Plaintiffs' next argument, that the BE Defendants somehow placed their alleged knowledge of any purported fraud at issue, is similarly unavailing. Plaintiffs contend that simply because the BE Defendants denied allegations in the Complaint as to the aiding and abetting fraud claim and represented Grimaldi, Hernandez and EZ Docs in matters subsequent to Canon USA's termination of EZ Docs, they have implicitly waived work product protection for the withheld documents. This is simply untrue. Under such a theory, any defendant who answered a complaint with a denial of allegations as to the elements of a claim would necessarily be putting those elements at issue, requiring production of protected documents and information. Moreover, it is the plaintiffs who put the BE Defendants' alleged knowledge at issue by way of the allegations in their Complaint, and the BE Defendants have not placed any of the withheld documents "at issue" by simply denying those allegations.

Importantly, plaintiffs have failed to cite to any case law supporting their contention that the mere denial of allegations in a complaint or representation of clients in defense of fraud claims places protected documents at issue and implicitly waives work product protection. Instead, plaintiffs rely on the inapposite cases of Pall Corp. v. Cunco Inc., 268 F.R.D. 167 (E.D.N.Y. 2010) (finding an implied waiver when the counterclaim defendant asserted good faith reliance on counsel but withheld production of documents that may bear on that good faith reliance), BNP Paribas v. Bank of New York Trust Co., 2013 WL 2434686 (S.D.N.Y. 2013) (finding an implied waiver when the plaintiff made testimonial use of a document and sought to withhold evidence concerning the origin of the document) and Newmarkets Partners, LLC v. Sal. Oppenheim Jr. & Cie, S.C.A., 258 F.R.D. 95 (S.D.N.Y. 2009) (holding that the plaintiffs' assertions of privilege created unfairness requiring forfeiture, as plaintiffs relied on communications and other documents to support their claims yet sought to prevent disclosure of these communications). Here, however, the BE Defendants are not relying on any protected documents for their defense and then refusing to produce them. See Nomura Asset Capital Corp. v. Cadwalader Wickersham and Taft LLP, 62 A.D.3d 581, 880 N.Y.S.2d 617 (1st Dept. 2009). The BE Defendants' assertion of denials in an answer and defense of their former clients in prior actions does not waive work product protection.

Finally, plaintiffs have failed to demonstrate substantial need for access to documents withheld by the BE Defendants on the basis of work product. The documents withheld as work product were prepared after EZ Docs was terminated by Canon USA, and in anticipation of EZ Docs' litigation against Canon USA. Plaintiffs have not demonstrated why or how these documents, prepared after plaintiffs contend the alleged fraud and aiding and abetting fraud occurred, are necessary to prepare their case, or that they cannot obtain the equivalent by other means. Importantly, plaintiffs have noticed the depositions of the attorneys who created these notes, weighing against a substantial need argument. See Costabile v. Westchester, New York, 254 F.R.D. 160, 167 (S.D.N.Y. 2008) (holding that the memoranda at question "were entitled to protection even to the extent that they are deemed factual because defendants could not show substantial need and undue hardship as the attorneys were available to be deposed"); In re Natural Gas Commodities Litigation, 232 F.R.D. 208 (S.D.N.Y. 2005). Plaintiffs have also failed to demonstrate how these documents are critical to whether or not the BE Defendants had actual knowledge of the alleged fraud or substantially assisted in the achievement of the alleged fraud. Moreover, plaintiffs have failed to demonstrate that the attorney notes prepared in anticipation of litigation do not contain the BE Defendants' mental impressions or legal strategy, which are subject to protection. See Newmarkets Partners LLC.

As the documents withheld by the BE Defendants are subject to work product protection and plaintiffs have failed to demonstrate waiver of the protection or substantial need for the documents, their motion should be denied.

POINT IV

AN *IN CAMERA REVIEW* IS NOT WARRANTED

It is well-settled that "[w]here the moving party seeks *in camera* review of documents to which the crime-fraud exception would potentially apply, the court should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies. Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court." In re: General Motors LLC Ignition Switch Litigation, supra (internal citations and quotations omitted). As discussed in more detail above, plaintiffs have failed to meet their burden to demonstrate that review of the materials would reveal evidence that the crime-fraud exception applies. Rather, plaintiffs simply claim that a fraud was committed, and as such, every communication with the BE Defendants must have been in furtherance of that fraud. This conclusory argument is insufficient to warrant an *in camera* review by this court. As such, plaintiffs' alternative request for relief should be denied.

Regarding plaintiffs' contention that all documents should be produced because the BE Defendants' descriptions of documents in their privilege log are insufficient, the BE Defendants disagree and believe their privilege logs to be sufficient. See Manson Dec., Exhibit 39; Allied Irish Banks, P.L.C. v. Bank of America, N.A., 252 F.R.D. 163, 167 (S.D.N.Y. 2008) (noting that [c]ases rejecting claims of privilege based on the inadequacy of the privilege log alone typically involve an absence of basis information such as names of recipients, dates, or subject matters of documents – or a failure to produce a log at all"). Notwithstanding, plaintiffs did not make any good faith effort to request supplemental descriptions for any privilege log entries it believed to be insufficient before the filing of their motion. See Fed. R. Civ. P. 37(a), Individual Rules of Practice of Judge Paul A. Crotty, U.S.D.J., Rule #3 C.

CONCLUSION

WHEREFORE, it is respectfully requested that plaintiffs' motion an Order, pursuant to Fed. R. Civ. P. 37(a), compelling the BE Defendants to produce documents withheld from production on the basis of attorney-client privilege and/or work product doctrine, be denied in its entirety, along with such further relief that this court deems just and proper.

Dated: New York, New York
March 11, 2016

Yours, etc.,

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